

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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MARCUS RONALD SWALLOW,

Case No. 3:23-CV-00227-ART-CLB

Plaintiff,

SCREENING ORDER

v.

ELKO COUNTY, *et. al.*,

Defendants.

Before the Court is Plaintiff Marcus Swallow's ("Swallow") application to proceed *in forma pauperis* (ECF No. 1), his *pro se* civil rights complaint (ECF No. 1-1), and his motion for appointment of counsel (ECF No. 1-3). The Court addresses each in turn.

I. IN FORMA PAUPERIS APPLICATION

A person may be granted permission to proceed *in forma pauperis* ("IFP") if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

Pursuant to the LSR 1-1: "Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The application must be made on the form provided by the court and must include a financial affidavit disclosing the applicant's income, assets, expenses, and liabilities."

"[T]he supporting affidavit [must] state the facts as to [the] affiant's poverty with some particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981) (quotation marks and citation omitted). A litigant need not "be absolutely destitute to enjoy the benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*,

1 335 U.S. 331, 339 (1948).

2 A review of the application to proceed IFP reveals Swallow cannot pay the filing
3 fee. (See ECF No. 1.) Accordingly, the IFP application is granted.

4 **II. SCREENING STANDARD**

5 Inmate civil rights complaints are governed by 28 U.S.C. § 1915A. Section 1915A
6 provides, in relevant part, that “the court shall dismiss the case at any time if the court
7 determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a
8 claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant
9 who is immune from such relief.” 28 U.S.C. § 1915A(b). A complaint is frivolous when
10 “it lacks an arguable basis in either law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325
11 (1989). This includes claims based on legal conclusions that are untenable (e.g., claims
12 against defendants who are immune from suit or claims of infringement of a legal interest
13 which clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,
14 delusional scenarios). *Id.* at 327–28; *see also McKeever v. Block*, 932 F.2d 795, 798 (9th
15 Cir. 1991). Dismissal for failure to state a claim under § 1915A incorporates the same
16 standard applied in the context of a motion to dismiss under Federal Rule of Civil
17 Procedure 12(b)(6), *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012), which
18 requires dismissal where the complaint fails to “state a claim for relief that is plausible on
19 its face,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

20 The complaint is construed in a light most favorable to the plaintiff. *Chubb Custom*
21 *Ins. Co. v. Space Systems/Loral Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). The court must
22 accept as true all well-pled factual allegations, set aside legal conclusions, and verify
23 that the factual allegations state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S.
24 662, 679 (2009). The complaint need not contain detailed factual allegations, but must
25 offer more than “a formulaic recitation of the elements of a cause of action” and “raise a
26 right to relief above a speculative level.” *Twombly*, 550 U.S. at 555. Particular care is
27 taken in reviewing the pleadings of a *pro se* party, for a more forgiving standard applies
28 to litigants not represented by counsel. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010).

1 Still, a liberal construction may not be used to supply an essential element of the claim
 2 not initially pled. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992). If dismissal is
 3 appropriate, a *pro se* plaintiff should be given leave to amend the complaint and notice
 4 of its deficiencies, unless it is clear that those deficiencies cannot be cured. *Cato v.*
 5 *United States*, 70 F.3d 1103, 1107 (9th Cir. 1995).

6 **III. SCREENING OF COMPLAINT**

7 In his complaint, Swallow sues Defendants Elko County and West Wendover
 8 Police Department (collectively referred to as “Defendants”), pursuant to 42 U.S.C. §
 9 1983. (See ECF No. 1-1.) Specifically, Swallow asserts violations by Defendants of
 10 excessive force, retaliation, and threat to safety related to an apparent officer involved
 11 shooting between Swallow and West Wendover Police Officers. (*Id.* at 2-5.)

12 While Swallow’s complaint is scant in detail, it alleges the following: On March 12,
 13 2020, after acting upon a confidential informant’s information about Swallow “bringing
 14 [and] selling drugs”, West Wendover Police Department Officers Luis Perez, Miguel
 15 Pantelakis, and Matthew Ulm “staked out” Swallow’s home and waited until Swallow
 16 exited and then attempted to “kill [Swallow] execution style by means of a firing squad.”
 17 (*Id.*) Swallow alleges the three officers shot over forty-seven times resulting in an
 18 unspecified injury to Swallow which required him to be “life flighted and hospitalized.” (*Id.*)
 19 Based on these allegations, Swallow asserts he is entitled to monetary damages. (*Id.* at
 20 6.)

21 While Swallow’s complaint need not contain detailed factual allegations, it must
 22 offer more than “a formulaic recitation of the elements of a cause of action” and “raise a
 23 right to relief above a speculative level.” *Twombly*, 550 U.S. at 555. Additionally, Federal
 24 Rule of Civil Procedure 8(a)(2) requires that a complaint contain “a short and plain
 25 statement of the claim showing that the pleader is entitled to relief, in order to give the
 26 defendant fair notice of what the . . . claim is and the grounds upon which it rests.”
 27 *Twombly*, 550 U.S. at 555 (quotation and alteration omitted).

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1 Here, the vagueness and conclusory nature of Swallow's complaint makes it
 2 difficult for the Court to determine whether any claims exist. For instance, while the
 3 complaint states "excessive force" it is unclear what the facts and circumstances
 4 surrounding this alleged excessive force incident were. Additionally, due to the vague
 5 nature of the complaint, it is unclear how each of the named defendants—who are only
 6 Elko County and West Wendover Police Department—were involved in the incident.

7 For all these reasons, the Court finds that Swallow's complaint fails to state a claim
 8 upon which relief may be granted. Accordingly, Swallow is granted leave to file an
 9 amended complaint to cure the deficiencies of the complaint. If Swallow chooses to file
 10 an amended complaint, he is advised that an amended complaint supersedes (replaces)
 11 the original complaint and, thus, the amended complaint must be complete in itself. See
 12 *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989)
 13 (holding that "[t]he fact that a party was named in the original complaint is irrelevant; an
 14 amended pleading supersedes the original"). Any allegations, parties, or requests for
 15 relief from prior papers that are not carried forward will no longer be before the Court.
 16 Swallow should clearly title the amended pleading as "First Amended Complaint." For
 17 each Defendant and each claim, he must allege true facts sufficient to show that the
 18 particular Defendant violated Swallow's rights. Swallow may not amend the complaint to
 19 add unrelated claims against other defendants.

20 The Court notes that, if Swallow chooses to file an amended complaint curing the
 21 deficiencies, as outlined in this order, he must file the amended complaint by Friday, July
 22 14, 2023. If Swallow chooses not to file an amended complaint curing the stated
 23 deficiencies, the Court will recommend that the case be dismissed.

24 **IV. MOTION FOR APPOINTMENT OF COUNSEL**

25 Finally, before the Court is Swallow's motion for appointment of counsel (ECF No.
 26 1-3). A litigant in a civil rights action does not have a Sixth Amendment right to appointed
 27 counsel. *Storseth v. Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981). The Supreme Court
 28 has ruled that district courts lack authority to require counsel to represent indigent

1 prisoners in § 1983 cases. *Mallard v. U.S. Dist. Court for the S. Dist. of Iowa*, 490 U.S.
 2 296 (1989). In only “exceptional circumstances,” the Court may request voluntary
 3 assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). *Palmer v. Valdez*, 560 F.3d
 4 965, 970 (9th Cir. 2009). Without a reasonable method of securing and compensating
 5 counsel, this Court will seek volunteer counsel only in the most serious and exceptional
 6 cases. A finding of such exceptional circumstances requires that the court evaluate both
 7 the likelihood of success on the merits and the *pro se* litigant’s ability to articulate his
 8 claims in light of the complexity of the legal issues involved. Neither factor is controlling;
 9 both must be viewed together in making the finding. *Cano v. Taylor*, 739 F.3d 1214, 1218
 10 (9th Cir. 2014). The Court exercises discretion in making this finding. *Id.* (citing *Palmer*,
 11 560 F.3d at 970).

12 In the present case, the Court does not find the required exceptional
 13 circumstances. Even if it is assumed that Swallow is not well versed in the law and that
 14 he has made serious allegations which, if proved, would entitle him to relief, his case is
 15 not exceptional. The Court is faced with similar cases almost daily. The Court will not
 16 enter an order directing the appointment of counsel in this case. Swallow has
 17 demonstrated that he is able to litigate this case on his own. Accordingly, the motion for
 18 appointment of counsel (ECF No. 1-3) is denied.

19 **V. CONCLUSION**

20 **IT IS THEREFORE ORDERED** that Swallow’s *in forma pauperis* application, (ECF
 21 No. 1), is **GRANTED**.

22 **IT IS FURTHER ORDERED** that the Clerk **FILE** the complaint, (ECF No. 1-1), but
 23 **SHALL NOT** issue summons at this time.

24 **IT IS FURTHER ORDERED** that Complaint is dismissed, in its entirety, with leave
 25 to amend, as outlined above.

26 **IT IS FURTHER ORDERED** that if Swallow chooses to file an amended complaint
 27 curing the deficiencies of his complaint, as outlined in this order, Swallow shall file the
 28 amended complaint by **Friday, July 14, 2023**.

1 **IT IS FURTHER ORDERED** that if Swallow chooses not to file an amended
2 complaint curing the stated deficiencies, the Court will recommend that the case be
3 dismissed.

4 **IT IS FURTHER ORDERED** that Swallow's motion for appointment of counsel,
5 (ECF No. 1-3), is **DENIED**.

6 **DATED:** June 14, 2023.

7 
8 **UNITED STATES MAGISTRATE JUDGE**